Supreme Court, U.S.
FILED
JUN 12 2000
CLERK

(3)

No. 99-1698

IN THE

Supreme Court of the United States

UNITED AIR LINES, INC., a Delaware corporation, and AIR WISCONSIN, INC., a Wisconsin corporation,

Petitioners,

v.

CITY AND COUNTY OF DENVER, a home rule City and a Colorado municipal corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

REPLY BRIEF FOR PETITIONERS

PAMELA F. OLSON
Counsel of Record
ALBERT H. TURKUS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Petitioners

15pp

RULE 29.1 LISTING

Petitioner United Air Lines, Inc., is a subsidiary of UAL Corporation, a publicly owned corporation. Petitioner Air Wisconsin, Inc., is a wholly-owned subsidiary of Air Wis Services, Inc., a wholly-owned subsidiary of UAL Corporation. United Air Lines, Inc., owns, either directly or indirectly, a 10% or more interest in the following entities: AirLiance Materials, LLC; Atlanta Airlines Terminal Corporation; CIMO, Inc.; DUNC, LLC; Galileo International, Inc.; GetThere.com; Reno Fueling Facilities Corp.; and Skytech Solutions, LLC.

TABLE OF CONTENTS

I. The Due Process/Vagueness Issue Was Properly Raised Below And Merits This Court's Consideration. 1

II. Denver's Opposition Fails To Rebut The Necessity For Clear Notice In The Area Of State And Local Tax Laws Affecting Taxpayers Engaged In Interstate Commerce. . . . 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases **Page(s)**

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 3

Connally v. General Construction Co., 269 U.S. 385 (1926) 5

Dennis v. Higgins, 498 U.S. 439 (1991) 6

General Motors Corporation v. City and County of Denver, 990 P.2d 59 (Colo. 1999) 1, 2, 6

United Air Lines, Inc. v. City and County of Denver, 973 P.2d 647 (Colo. Ct. App. 1998), *aff'd*, 992 P.2d 41 (Colo. 2000) 3

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 6

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 2

Statutes **Page(s)**

D.R.M.C. § 53-92 4

D.R.M.C. § 53-97(11) 1, 4

D.R.M.C. § 53-111(b) 5

U.S. CONST. art. I, § 8 ..... 1, 2, 4

U.S. CONST. amend. XIV, § 1 ..... 5, 6

I. The Due Process/Vagueness Issue Was Properly Raised Below And Merits This Court's Consideration.

In Respondent's Brief in Opposition ("Opposition"), Denver argues that the issue of vagueness was not properly or timely raised, because it was neither raised by the Airlines below nor ruled upon in the lower courts. Opposition at 6-7.

To the contrary, as explained in greater detail in the Airlines' Petition for Writ of Certiorari ("Petition"), the Airlines repeatedly addressed the use tax law's failure to provide the clear guidelines particularly needed in a self-assessment system of taxation and explained that Denver's vacillating and conflicting views on whether the full credit was required creates a serious concern that the Commerce Clause[1/] violation will recur and has resulted in confusion to taxpayers. *See* Petition at 5-7. The Airlines further argued that interpreting D.R.M.C. § 53-97(11) to provide the full credit would do violence to the statutory language and the legislative intent of the Denver City Council. *See id.* at 6-7. Thus, the Airlines properly raised the vagueness issue in the proceedings below.

In addition, the Supreme Court of Colorado itself addressed the vagueness issue in its opinion in *General Motors Corporation v. City and County of Denver*, 990 P.2d 59, 70, n.11 (Colo. 1999) (App. 19c).[2/] Consequently, the

---

1/ U.S. CONST. art. I, § 8.

2/ Denver's assertion that "there is no decision on the merits from the Colorado Supreme Court in the present case"

(continued...)

vagueness issue is properly before this Court. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991).

Denver's belated attempt in the Opposition to gloss over its past vacillation only highlights the necessity for a clear mandate from this Court. Denver asserts that "Denver would not have given the credits [to the Airlines] in the first place had Denver not concluded there was a legal basis for doing so." Opposition at 5. This assertion, however, is flatly contradicted by Denver's insistence that it was not required to give the full credit – a claim it made both before the Court of Appeals of Colorado in the Airlines' case and before the Colorado Supreme Court in *General Motors*, which was pending before the Colorado Supreme Court at the same time as this case.[3/] *See* Petition at 7-8. Apparently Denver

---

[2/] (...continued)
(Opposition at 6) is absurd in light of the Colorado Supreme Court's opinion in the Airlines' case that it viewed its decision in *General Motors* "as fully and completely addressing the issue on which we granted certiorari in this case." Colorado Supreme Court Opinion, at 2 (Jan. 24, 2000) (App. 2a).

[3/] Denver further asserts that it "chose to abide by the [Denver District Court's] decision and its requirement that Denver provide all state and local tax credits." Opposition at 5. However, Denver's failure to appeal the District Court's decision on the Commerce Clause issue did not signify its agreement with the decision, inasmuch as it continued to dispute this issue before the court of appeals. *See* Petition at 6. Denver itself admits that it "argued that lateral credits

(continued...)

believed that there was both a legal basis for granting the full credit and a legal basis for not granting the full credit. Thus, the lack of a statutory provision clearly requiring the full credit allows Denver an opportunity once again to deny the credit which the Colorado Supreme Court has required it to grant and leaves taxpayers without knowledge of its availability.

Denver's argument that the Airlines were not prejudiced by any lack of notice or vagueness in the use tax statute is a mere variation on the standing argument it made in the district court and court of appeals. In those courts, Denver argued that the Airlines had no standing to challenge the constitutionality of the use tax because Denver had decided to grant the full credit in this case. Denver's Answer Brief to the District Court, at 15-17; Denver's Answer Brief to the Court of Appeals, 15. The Airlines explained that they had standing because of the possibility that the constitutional violation will recur in the future. Airlines' Opening Brief to the District Court, at 34-37; Airlines' Reply Brief to the District Court, at 11-12; Airlines' Opening Brief to the Court of Appeals, at 8-10; *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982). Both the district court and the court of appeals concluded that the Airlines did have standing to challenge the constitutionality of Denver's use tax. District Court Opinion, at 3 (Dec. 12, 1996) (App. 5e); *United Air Lines, Inc. v. City and County of Denver*, 973 P.2d 647, 651-52 (Colo. Ct. App. 1998), *aff'd* 992 P.2d 41 (Colo. 2000) (App. 4d-8d). The possibility of a future constitutional violation is particularly acute here given

---

[3] (...continued)
were probably sufficient" before the court of appeals. Opposition at 5.

Denver's vacillating and conflicting positions regarding the requirement of a full credit. The fact that Denver could, and did, assert flatly contradictory positions at the same time in the Colorado Supreme Court illustrates that there can be no certainty how Denver will administer this statute.

II. Denver's Opposition Fails To Rebut The Necessity For Clear Notice In The Area Of State And Local Tax Laws Affecting Taxpayers Engaged In Interstate Commerce.

Denver's Opposition illustrates its fundamental lack of understanding as to the constitutional defect of its use tax law. First, Denver asserts that there is no federal question properly before this Court because the Colorado Supreme Court effectively ruled in favor of the Airlines on the Commerce Clause issue, and because the Colorado Supreme Court's ruling itself is not vague. Opposition at 7-9. However, in attempting to cure the Commerce Clause defect of the Denver use tax without invalidating the use tax, the Colorado Supreme Court substituted a vagueness defect for the Commerce Clause defect, and this vagueness defect is the heart of the Airlines' Petition. Likewise, Denver's assertion that the "terms of the ordinances cannot be clear and vague at the same time" (*id.* at 9) is nothing more than a confusion that Denver has inflicted on itself. Given Denver's adeptness at interpreting the same statute in two contradictory ways, it seems as though a statute can, in fact, be both clear and vague if placed in the hands of the wrong administrator. In this case, the statutory language of D.R.M.C. § 53-92(c) and § 53-97(11) is clear, and violates the Commerce Clause. The Colorado Supreme Court's "interpretation" of these provisions cures the Commerce Clause defect, but creates vague-

ness in violation of the Due Process Clause[4/]. It is that violation which requires this Court's consideration.

Second, Denver suggests that the failure of the use tax statute to give notice of the full credit to taxpayers does not concern Denver because "[w]hether a taxpayer avails itself of a credit is the taxpayer's responsibility" and the "taxpayer must be aware of the laws in a taxing jurisdiction and apply for any appropriate credits." Opposition at 10. However, the Due Process Clause requires that the law be clear and certain to persons of "ordinary intelligence," not just to constitutional scholars. *See, e.g., Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). This is especially important for taxing statutes, which affect a wide range of people. A taxpayer should not have to be a constitutional scholar or regularly read court opinions to know to what credit he is entitled. Denver's nonchalance is particularly troubling in light of the limited scope of its refund statute. Under D.R.M.C. § 53-111(b) (Reply App. 1a), a taxpayer has only 60 days to file a claim for refund after the purchase of taxable goods or performance of taxable services. Unless taxpayers are already aware of the availability of the full credit when they initially pay the use tax, it is unlikely that they will ever have a meaningful opportunity to learn about it and timely claim a refund based on the full credit. Given Denver's past behavior, one can take little comfort in Denver's claim that "[t]he suggestion that Denver would blatantly disregard a rule of law . . . is ludicrous," or in its assertion that minimum guidelines for administration are unnecessary (Opposition at 10-11). It must be noted that, even after the district court and the court of appeals decided that the full credit is a constitu-

---

[4/] U.S. CONST. amend. XIV, § 1.

tional requirement, Denver continued to deny such credits in *General Motors*.

Third, Denver suggests that the Due Process Clause requirement applies only where "a statute's failure to inform an individual of prohibited conduct resulted in the imposition of a penalty." Opposition at 11. Noting that "there is no penalty for failing to apply for a credit" and "there is no conduct to be prohibited," Denver suggests that the Due Process Clause requirement does not apply. *Id.* Denver's extremely limited view of what the Due Process Clause requires cannot be reconciled with this Court's jurisprudence. Taxation involves the exaction of the taxpayer's property, and exacting more than what is provided in the law is an unjust deprivation of property. Thus, Denver's failure to give notice of the full credit requirement to taxpayers deprives them of a fundamental right, just as a failure to give notice of a prohibited conduct. While the Due Process Clause consideration would be of paramount importance in the criminal law area, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Since participation in interstate commerce is a constitutionally protected right, *Dennis v. Higgins*, 498 U.S. 439, 448 (1991), Denver's use tax regime, which unduly burdens this right, should receive close scrutiny by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PAMELA F. OLSON
Counsel of Record
ALBERT H. TURKUS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Petitioners

June 12, 2000

APPENDIX

CHARTER AND CODE OF ORDINANCES, DENVER, COLORADO
TITLE II REVISED MUNICIPAL CODE
CHAPTER 53 TAXATION AND MISCELLANEOUS REVENUE

ARTICLE II. SALES TAX
DIVISION 1. GENERALLY

Sec. 53-111. Refund procedures.

(a) Generally. A refund shall be made or credit allowed for the tax so paid under dispute by any purchaser who has an exemption as provided in this article. Interest shall be paid on refunds, but not credits, for overpayments made after October 1, 1993. Interest shall accrue from the time the overpayment is made. The rate of interest shall be fixed and shall be the average monthly rate earned by the city on the general fund for the calendar year immediately preceding the year in which the refund is made. Such refund shall be made by the manager upon entitlement thereto shown by the applicant and only after compliance with the following conditions.

(b) Application. Applications for refund must be made within sixty (60) days after the purchase of the goods or the performance of the services on which the exemption is claimed. The application must be supported by the affidavit of the purchaser accompanied by the original paid invoice or sales receipt and be made upon such forms and contain such information as shall be prescribed by the manager.

(c) Decisions. Upon receipt of such affidavit, invoice or receipt, and application, the manager shall examine the same with all convenient speed and shall give notice to the

applicant by an order in writing of his decision thereon.

(d) Hearing. An aggrieved applicant may, within twenty (20) days after such decision is mailed postpaid by certified mail to him, petition the manager of revenue for a hearing on the claim in the manner provided hereinafter regarding assessments and estimates of unpaid taxes.

(e) Refunds not assignable. The right of any person to a refund under this article shall not be assignable, and application for refund must be made by the same person who purchased the goods or services and paid the tax thereon as shown in the invoice for the sale thereof.

(f) Penalty for violating refund provisions. Any applicant for refund under the provisions hereinabove, or any other person, who shall make any false statement in connection with an application for a refund of any tax shall be deemed guilty of a violation of this article.

(g) Violations of refund provisions to be used as evidence of fraudulent intent. If any person be convicted under the provisions of this section, the proof of such conviction shall be prima facie evidence of fraud by that person in any appropriate action brought or taken for recovery of other refunds made by the manager to such person within the prior three (3) years to the conviction. A brief summary of the penalties available under this article for violations of it shall be printed on each form issued by the manager for application for refund.

(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 680-87, § 8, 11-23-87; Ord. No. 662- 93, § 2, 8-30-93)